U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE: DEC 23 1988

CASE NO. 88-INA-87

IN THE MATTER OF:

NEWARK BETH ISRAEL MEDICAL CENTER,
Employer,

on behalf of,

HUMBERTO JOSE RODRIGUEZ,
Alien.

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and Brenner, DeGregorio, Guill, Tureck and Schoenfeld Administrative Law Judges

MICHAEL H. SCHOENFELD
Administrative Law Judge

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. §656.26 of the United States Department of Labor Certifying Officer's denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, U.S.C. 1182(a)(14) ("the Act").

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF") and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

We are asked to review the decision of the Certifying Officer ("C.O.") denying Employer's application for labor certification. The C.O. denied Employer's application on the grounds that Employer did not submit documentation to clearly show that the alien (1) had passed Parts I and II of the National Board of Medical Examiners Examination, or (2) held a valid specialty certificate and was permanently licensed and practicing medicine in a state on January 9, 1977, as required by 20 C.F.R. §656.20(d).

We affirm the decision of the C.O. and deny Employer's application for labor certification. Employer's application did not include the documentation required by Section 656.20(d).

The Facts

Employer, Newark Beth Israel Medical Center, filed an application on October 21, 1985 on behalf of the alien, Humberto Jose Rodriguez for the position of Clinical Assistant in Cardiac Pacing (Pacemaker Fellowship) (AF18). The Department of Labor classified the position as "Surgeon" (AF18).

In the May 18, 1987 Notice of Findings (AF61-64) the C.O. found that Employer had not met the requirements of §656.20 because Employer had not submitted documentation to show that the alien (1) has passed Parts I and II of the National Board of Medical Examiners Examination or the Visa Qualifying Examination, or (2) held a valid specialty certificate and was permanently licensed and practicing medicine within a state on January 9, 1977. The C.O. found that neither of the above two requirements had been satisfied. The C.O. further stated that although the alien had a Specialty Certificate issued by the Board of Medical Examiners in California in July 1975, there was no documentation that the alien was permanently licensed and practicing medicine within a state on January 9, 1977. The C.O. requested that Employer establish that one of the above-stated requirements was met (AF 63-64).

Employer submitted a Rebuttal on June 19, 1987 (AF62-66). Employer submitted documentation that showed the alien was licensed to practice medicine in the State of California as of July 7, 1975 (AF65). Employer further stated it intended to submit documentation that the alien practiced medicine at the time required by the regulations (AF66). No such documentation, however, was submitted by Employer.

On July 10, 1987 the C.O. issued a Final Determination, rejecting Employer's application for labor certification (AF 67-70). The C.O. determined that Employer had not met the requirements of §656.20 because the rebuttal did not establish that the alien passed Part I and II

of the National Board of Medical Examiners Examination or the Visa Qualifying Examination. Furthermore, while the alien was issued a license to practice medicine in California, there was no evidence that he was practicing medicine on January 9, 1977 in California or any other state (AF 69).

Employer requested a review of the C.O.'s denial of the application for labor certification on August 3, 1987 (AF71).

Discussion

The applicable regulation states:

> (d) If the application involves labor certification as a physician (or surgeon) (except a physician (or surgeon) of international renown), the labor certification application shall include the following documentation:
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> (1) (i) Documentation which shows clearly that the alien has passed Parts I and II of the National Board Of Medical Examiners Examination (NBMEE), or the Visa Qualifying Examination (VQE) offered by the Educational Commission for Foreign Medical Graduates (ECFMG); or
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> (ii) Documentation which shows clearly that:
>
> (A) The alien was on January 9, 1977, a doctor of medicine fully and permanently licensed to practice medicine in a State within the United States;
>
> (B) The alien held on January 9, 1977, a valid specialty certificate issued by a constituent board of American Board of Medical Specialties; and
>
> (C) The alien was on January 9, 1977, practicing medicine in a State within the United States; or
>
> (iii) The alien is a graduate of a school of medicine accredited by a body or bodies approved for the purpose by the Secretary of Education or that Secretary's designee (regardless of whether such school of medicine is in the United States).

20 C.F.R. §656.20(d).

Employer's application involves labor certification of a physician, and so must meet the above requirements. The C.O. is correct in stating that the application contains no documentation that the alien has passed Parts I and II of the National Board of Medical Examiners Examination or the Visa Qualifying Examination. The application thus does not meet the requirements of

656.20 (d)(1)(i). The Employer, in its brief dated March 4, 1988,[1] concedes that the alien was not practicing medicine in the United States on January 9, 1977. This concession is consistent with the alien's resume (AF4) indicating that from July 1975 through November 1977 he was in Venezuela. The requirements of Part C of §656.20 (d)(1)(ii) are not met.

Employer argues however that the alien's qualifications "more than comply" with the requirements "intended by the Legislature" when the regulations were enacted. In this case the requirements imposed by the regulation are abundantly clear. It is also clear that those requirements have not been met. Under these circumstances, we decline counsel's invitation to look behind the regulation in an attempt to determine the intent of the"Legislature."

Because Employer failed to document that the alien meets the requirements contained in §656.20(d), the application for labor certification must be denied. Accordingly, we uphold the C.O.'s decision to deny certification.

ORDER

The decision of the Certifying Officer to deny labor certification is affirmed.

MICHAEL H. SCHOENFELD
Administrative Law Judge

MHS/LS/mlc

Judge Guill, dissenting

In footnote 1 on page 4 the majority states:

> In view of our disposition of this case it is immaterial but worth noting that while counsel, throughout the proceedings appears to have represented both Employer and the alien, (AF1) Employer disavows any knowledge of an appeal having been requested.

Twenty C.F.R. §§656.26(a)(1) and (2) provide:

> (a) If a labor certification is denied, a request for review of the denial may be made to the Board of Alien Labor Certification Appeals:
> (1) By the employer; and

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[1] In view of our disposition of this case it is immaterial but worth noting that while counsel, throughout the proceedings appears to have represented both Employer and the alien, (AF1) Employer disavowed any knowledge of an appeal having been requested. An employer is a necessary party to any appeal to this board. 20 C.F.R. §656.26(a).

(2) By the alien, but only if the employer also requests such a review.

In response to the Notice of Docketing, issued December 30, 1988, Employer informed the Board that it was unaware that a Petition for Review of the Certifying Officer's Denial of Labor Certification had been filed. Employer having not petitioned for review, this matter is not reviewable by the Board.